Supreme Court, U.S.
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No. 06-1578

IN THE

Supreme Court of the United States

ANDALUSIA DISTRIBUTING COMPANY, INC., *ET AL.*,
Petitioners,

v.

R.J. REYNOLDS TOBACCO COMPANY,
Respondent.

ANDALUSIA DISTRIBUTING COMPANY, INC., *ET AL.*,
Petitioners,

v.

PHILIP MORRIS USA INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT R.J. REYNOLDS TOBACCO COMPANY

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QUESTION PRESENTED

Whether petitioners failed to substantiate factually their claim that the market share discount program offered by respondent R.J. Reynolds Tobacco Company was not "functionally available" to them?

CORPORATE DISCLOSURE STATEMENT

Reynolds American Inc. and R.J. Reynolds Tobacco Holdings, Inc. are the parent companies of respondent R.J. Reynolds Tobacco Company, and Reynolds American Inc. is a publicly traded company.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners filed a Robinson-Patman Act claim against respondent R.J. Reynolds Tobacco Company ("RJR") for alleged price discrimination arising from RJR's market share discount program. After extensive discovery, a magistrate judge recommended, and the district court entered, an order granting summary judgment to RJR. The Sixth Circuit Court of Appeals affirmed in a unanimous opinion. Accepting that a share-based discount program might not be "functionally available" in certain circumstances, the Court of Appeals determined that petitioners had failed, as a factual matter, to show that this was such a circumstance.

A. Factual Background

Four categories of cigarettes, differentiated by quality and price, are sold in the United States. R.174, JA873; R.74, JA315.[1] RJR sells first-tier (Camel and Winston), second-tier (Doral), and third-tier (Monarch, Best Choice, Citation) cigarettes, but not fourth-tier cigarettes. Pet. App. 2a-3a. RJR competes against producers of all types of cigarettes. R.174, JA1156. Since 1998, sales of fourth-tier cigarettes have increased markedly. Pet. App. 3a. In 1998, the fourth-tier segment comprised less than one percent of the cigarette market; by 2003, just five years later, it had grown to 15 percent. Pet. App. 3a. During this time period, RJR saw its market share decrease. Pet. App. 3a.

In response to the competition in the cigarette marketplace, RJR in 2000 began to offer wholesalers a range of discounts and rebates in return for their efforts to increase

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[1] "Pet." refers to the petition for certiorari; "Pet. App." refers to the appendix thereto; "R." refers to the record; and "JA" refers to the joint appendix in the Court of Appeals.

the sale of the RJR "savings" brands. R.174, JA1157; R.65, JA207-08; R.165, JA454-55. The purpose of the program was to induce wholesalers—which make large profit margins on the sale of fourth-tier cigarettes, R.174, JA3066; R.65, JA250-51, 281—to push retailers toward RJR brands, in-store displays, and promotions. R.174, JA1158-59, 1161-62, 1146, 1166-67. RJR sought to use these incentives to encourage wholesalers to leverage their close relationship with retailers in favor of RJR products. Specifically, RJR lacks the sales personnel to cover the nearly 400,000 cigarette retailers nationwide, but its wholesalers frequently visit those retailers and often are the last point of contact before a sale is made. R.174, JA1145, 1158; R.65, JA257.

Pursuant to its Wholesale Partners Program ("WPP"), RJR offered to wholesalers a market share discount, with the amount of the discount increasing along with the percentage of RJR's savings brands each wholesaler sold in relation to its total savings brand cigarette sales. R.165, JA478-80, 485. The WPP set the base target on a state-by-state basis, ensuring that a wholesaler's performance was measured against RJR's market share in the state or states where the wholesaler did business. R.165, JA460-62. In each state, the target was set at 25-40 percent *below* RJR's existing market share in that state to ensure that the incentives were attainable by all wholesalers. R.165, JA457-59, 721-51; R.174, JA1157-58. Graduated levels of standardized discounts and rebates were then available, with higher discounts corresponding with higher percentages of RJR products sold. R.165; JA478-80, 485. The volume of sales was irrelevant under the WPP; small wholesalers were treated identically to large wholesalers because a wholesaler's participation was based on the relationship between its sales of RJR's savings brands to its overall savings brand sales. R.174, JA1157-58. All wholesalers were aware of, and eligible for, each level of discount under the WPP. Pet. App. 42a-43a.

B. Procedural Background

Petitioners (and other plaintiffs that have now abandoned the case, Pet. ii) challenged RJR's market share discount program in 2003 under the Robinson-Patman Act, 15 U.S.C. § 13(a). R.1, JA67-77. Petitioners are 12 of the approximately 700 wholesalers that distribute RJR products. Pet. App. 40a. Although all petitioners received discounts under the WPP, they complain that they were "unable to qualify for the lowest prices without losing customers who demanded . . . relatively high-levels of non-RJR products." Pet. 7. Petitioners specifically argue that "it was impossible to meet RJR's . . . targets because they sell to retailers in rural, lower income areas that had a uniquely high demand for the cheapest, fourth-tier cigarettes." Pet. App. 7a.

After extensive discovery, RJR moved for summary judgment. R.164. A magistrate judge recommended summary judgment for RJR. Pet. App. 115a-135a. The district court agreed, concluding in a separate opinion that "because the plaintiffs did not take advantage of a lower price or discount which was functionally available on an equal basis, no price discrimination has occurred." Pet. App. 113a.

The Sixth Circuit affirmed in a unanimous opinion. Pet. App. 1a-50a. It began by noting that RJR's "market-share discount pricing structure[] present[s] different concerns than the volume-based discounts" that courts—including this Court in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948)—have typically addressed. Pet. App. 18a. "Market-share discounts," the Sixth Circuit explained, "theoretically level the playing field by allowing competing purchasers of like commodities to participate on equal terms, regardless of size, because such discounts depend not on volume purchases, but on the percentage of purchases of a particular category of products." Pet. App. 18a. The panel nonetheless disavowed any suggestion "that market-share discounts are immune from Robinson-Patman scrutiny": "It is certainly

conceivable that under certain circumstances, as alleged here by plaintiffs, market-share discounts could be administered in such a manner that such incentives cross the fine line from pro-competitive incentives to exclusionary, anti-competitive price discrimination." Pet. App. 18a (citing *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963)).

The Sixth Circuit therefore followed this Court's prescription of "case-by-case evaluation of antitrust claims" and held that "if there is evidence of discrimination in price between different purchasers of the same commodities," there may be a violation of the Robinson-Patman Act, "regardless of the mechanics of [the] pricing structure." Pet. App. 19a (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992)).

After surveying the case law on "functional availability"[2] and rehearsing the parties' arguments, the Sixth Circuit, in Part IV.B of its opinion, held that "the undisputed material facts demonstrate that RJR's best discount under the WPP was functionally available to plaintiffs on an equal basis." Pet. App. 42a. It determined that the "evidence shows that RJR has evenhandedly applied the WPP, treating all of its wholesalers equally and offering all of them the same qualification terms" and that "there is no evidence that RJR manipulated the WPP to favor certain wholesalers." Pet. App. 43a. It added that "[b]ecause participation in the program did not depend on the volume of a wholesaler's RJR sales, small wholesalers were treated the same as large wholesalers." Pet. App. 43a.

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[2] The Court of Appeals explained that "'[w]here a purchaser does not take advantage of a lower price or a discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or that the discrimination is not the proximate cause of the injury.'" Pet. App. 21a (quoting *Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir. 1981)).

The Court of Appeals then turned to petitioners' "core argument" that the WPP was nonetheless functionally unavailable to them because they serviced retailers who sold to (i) "poorer customers" with (ii) "a uniquely high demand for fourth-tier cigarettes." Pet. App. 43a. It found that petitioners have "proffered neither statistical evidence nor expert testimony to support these allegations." Pet. App. 44a.

First, with respect to the relative wealth of customers of different wholesalers, the Sixth Circuit noted that RJR had submitted evidence from the U.S. Department of Commerce "show[ing] that the average per capita income in the served counties exceeded that of the counties not served for most plaintiffs." Pet. App. 44a; *see also* R.165, JA675-76. In contrast, the Court noted, "[p]laintiffs' expert conducted no analysis of this issue and admitted that he did not plan to offer an opinion on whether plaintiffs sold in lower-income areas." Pet. App. 44a; *see also* R.165, JA657, 665-66. The Court further found that the individual plaintiffs either sold "in virtually the same areas as another allegedly favored wholesaler"; conceded "that their sales areas include entire states, not merely low-income pockets in those states" or "that they serviced higher-income portions of their sales areas or that higher-income areas existed in their sales areas"; or "had no evidence that they served lower-income areas or that their perception that they served lower-income areas was simply conjecture." Pet. App. 44a-45a; *see also* R.165, JA492-93, 506-07, 516-17, 522-27, 533-34, 540, 548-49, 554-55, 561-62, 574-75, 582-83, 591, 596, 610, 616-20, 635-38, 645-46, 675.

Second, with respect to the relative demand for fourth-tier cigarettes of customers of different wholesalers, the Sixth Circuit noted that, "[a]gain, plaintiffs' expert did not address this issue." Pet. App. 45a. The Court further found that plaintiffs "failed to substantiate, with comparative data, differences in fourth-tier demand between the areas of states where they sell and those states as a whole" and "presented

no evidence that RJR's share in areas where plaintiffs sold was any different than RJR's statewide shares where the allegedly less-affluent areas were located." Pet. App. 45a. The Court of Appeals concluded that "plaintiffs have thus failed to show that actual demand for fourth-tier cigarettes was, in fact, higher in their sales areas." Pet. App. 45a.

The Sixth Circuit thus found no evidentiary support for petitioners' "core argument": "In sum, plaintiffs are unable to verify the grounds for their price discrimination claim—that they predominately service retailers who sell to poorer customers, resulting in uniquely high demand for fourth-tier cigarettes—in turn foreclosing proofs that the WPP actually disfavored plaintiffs on the basis of these characteristics." Pet. App. 45a.

"In any event," the Sixth Circuit continued, "there is no evidence that anything other than plaintiffs' marketing decisions impacted their ability to obtain the WPP's best prices." Pet. App. 45a. It rejected the significance of the fact that "only a small percentage of wholesalers" actually reached the maximum discount because "[t]he very nature of an incentive program necessarily leads to different outcomes based on performances." Pet. App. 46a. And, in response to plaintiffs' suggestion that RJR could have "'set share targets that are reasonably related to each distributor's past sales and market share,'" the Sixth Circuit said that it would not "re-engineer the uniformly applied WPP incentive program to make it more reasonable for some participants." Pet. App. 46a. It concluded that the "undisputed evidence demonstrates that plaintiffs faced a choice that was not an inequity imposed by the pricing structure" and that "[p]laintiffs could alter their sales mix at any time so as to qualify for the varying discount levels." Pet. App. 45a-46a (internal quotation marks and citation omitted).

REASONS FOR DENYING THE PETITION

Petitioners do not allege any split of authority, and the Sixth Circuit's application of settled and inherently fact-

specific "functional availability" law cannot possibly warrant this Court's review.

First, petitioners wholly mischaracterize the Court of Appeals' decision. The Sixth Circuit *agreed* with petitioners that, under certain circumstances, a market share discount program could be administered in a discriminatory manner. It found, however, that petitioners had failed to substantiate factually that this was such a circumstance. The premise of petitioners' Robinson-Patman Act claim is that the smokers who visited their retail customers had atypical attributes (low income and preference for fourth-tier cigarettes) which prevented petitioners from selling more RJR products to those retail customers, and that petitioners—unlike allegedly "favored" wholesalers—were therefore unable to obtain higher discounts under the WPP. The Sixth Circuit, however, found no evidence to support the premise of that claim, *i.e.*, that petitioners' customers were different than the customers of wholesalers that earned higher discounts. Finding nothing unique about petitioners' businesses that would preclude them from selling more RJR cigarettes, the Sixth Circuit concluded that the WPP was functionally available to them. This factbound application of blackletter law did not resolve any significant legal issue and does not warrant certiorari review, particularly considering that petitioners allege no split.

Second, petitioners' merits-based arguments simply build upon their erroneous characterization of the Sixth Circuit's opinion. Far from immunizing market share discount programs from Robinson-Patman Act scrutiny, the Sixth Circuit's opinion explicitly affirms that both share-based and volume-based discount programs must be functionally available to all buyers. In any event, even if the Court of Appeals did something more than apply settled law (and it did not), petitioners allege no split of authority. Their arguments are also baseless. The Sixth Circuit expressly applied, and its opinion is fully consistent with, *Morton Salt*, as well as functional availability precedent in the lower

courts. Petitioners' proposed *per se* rule against market share discounts, in contrast, is bereft of any support in the case law and would turn the Robinson-Patman Act on its head.

I. THE SIXTH CIRCUIT DID NOT "EFFECTIVELY REPEAL" THE ROBINSON-PATMAN ACT; IT APPLIED SETTLED LEGAL PRINCIPLES TO THE FACTS OF THIS CASE

Petitioners argue that the Sixth Circuit's decision "immunize[s] price discrimination from scrutiny under the Robinson-Patman Act" and "effectively overrules *Morton Salt*." Pet. 3, 16. The Court of Appeals, they claim, established a "rule that a discount is 'available' even if the qualifications are tailored in such a way that only favored buyers have any realistic opportunity to take advantage of it." Pet. 19-20. These statements find no mooring in the unanimous decision of the Sixth Circuit. Although it is never mentioned in the petition for certiorari, the Sixth Circuit unequivocally held that petitioners failed to substantiate—as a *factual* matter—the central premise of their Robinson-Patman Act claim, *viz.*, that the WPP was a "worthless choice" for them because of "their customers' demands for . . . non-RJR products." Pet. 3, 17.

In accordance with settled law, the Sixth Circuit held that the functional availability doctrine precludes recovery if "the same prices were available to the plaintiff from a *practical standpoint* and on equal terms with its competitors." Pet. App. 21a (internal quotation marks and citation omitted; emphases added). Although most secondary-line Robinson-Patman Act cases have, like *Morton Salt*, involved "volume discount programs," the Court of Appeals concluded that the functional availability doctrine applies equally to market share discount programs like the WPP: "[T]he functional availability doctrine has been applied historically in the context of quantity discounts, but its underlying rationale—that a discount equally and realistically available to all

purchasers of a like commodity does not constitute discrimination in price within the meaning of § 13(a)—is no less relevant in judging the legality of market-share discount formulas such as the WPP." Pet. App. 32a.

Citing this Court's decision in *Eastman Kodak*, the Sixth Circuit emphasized "a case-by-case evaluation of antitrust claims" and held that a market share discount program could violate the Robinson-Patman Act "if there is evidence of discrimination in price between purchasers of the same commodities." Pet. App. 19a. It then concluded that there was no such evidence here.

As discussed in the Statement, *supra*, the Court of Appeals found that plaintiffs had failed to present triable evidence (as they were required to do on summary judgment) that (i) the areas they serviced were poorer than the areas serviced by allegedly favored wholesalers and (ii) the retail customers in their areas had greater demand for fourth-tier cigarettes than the retail customers in the areas of allegedly favored wholesalers. Pet. App. 43a-45a. It was, according to the Sixth Circuit, petitioners' inability to "*verify the grounds* for their price discrimination claim" that "in turn foreclos[ed] proofs that the WPP *actually disfavored* plaintiffs." Pet. App. 45a (emphases added). The Sixth Circuit thus found that petitioners and other wholesalers were similarly situated and that petitioners "could alter their sales mix at any time so as to qualify for the varying discount levels." Pet. App. 46a. "The undisputed evidence," the Court found, "demonstrates that plaintiffs faced a choice that was not an inequity imposed by the pricing structure but a fundamental economic conundrum *faced by all sellers*." Pet. App. 45a (internal quotation marks and citation omitted; emphases added).

It was thus petitioners' evidentiary failing that dictated the Court of Appeals' result, not any sweeping legal holding regarding the applicability of the functional availability doctrine to market share discount programs. The Sixth

Circuit expressly *agreed* with petitioners that "under certain circumstances, as alleged here by plaintiffs, market-share discounts could be administered in such a manner that such incentives cross the fine line from pro-competitive incentives to exclusionary, anti-competitive price discrimination." Pet. App. 18a. It held, however, that petitioners had not factually established such a circumstance here. *E.g.*, Pet. App. 49a ("Under the circumstances, we affirm the district court's order granting summary judgment in favor of defendant.").

This puts to lie petitioners' claim that "in the Sixth Circuit, a seller need only say that it 'offered' the discounts to everyone, including those for whom the offer was useless." Pet. 21. The Court of Appeals did not stop its analysis after concluding that "the evidence shows that RJR has evenhandedly applied the WPP, treating all of its wholesalers equally and offering all of them the same qualification terms." Pet. App. 43a. It went on to analyze, in considerable detail, the (lack of) evidence regarding petitioners' "core argument that RJR's [discounts] were unattainable." Pet. App. 43a. Nor did the Sixth Circuit "take[] as established that making th[e] choice [to obtain higher discounts under the WPP] would cause a massive loss of customers," as petitioners also assert. Pet. 17. It instead found no evidence that "the WPP actually disfavored plaintiffs" and therefore concluded that petitioners, like similarly-situated wholesalers that received higher discounts, could have achieved the WPP's discounts with different "marketing decisions." Pet. App. 45a.[3]

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[3] Not only that, but each petitioner admitted that it had no evidence showing a higher demand for fourth-tier cigarettes in its area. R.165, JA494-95, 500, 505-09, 517-18, 525, 531-32, 539, 550, 554-55, 569, 576-77, 583-85, 590, 597-600, 605-06, 611-12, 620-21, 629-30, 639-40, 647-49. Indeed, in virtually all of the counties served by petitioners, the actual RJR sales rate exceeded the target rate under the WPP, so that if

Petitioners make no allegation that the Sixth Circuit misconstrued the evidence or misapplied the summary judgment standard. Nor do they identify any language in the Sixth Circuit's opinion holding that a seller may "set[] conditions for qualifying for the lower price that only some favored buyers can comply with." Pet. 3. They intimate that the Sixth Circuit "held" that a discount offer would survive Robinson-Patman Act scrutiny "even if the circumstances of [p]etitioners' businesses functionally prevented them from accepting." Pet. 9. But the language that petitioners cite instead confirms that the decision rested on the specific facts of this case: "'[T]here is *no evidence* that anything other than plaintiffs' marketing decisions impacted their ability to obtain the WPP's best prices. The *undisputed evidence* demonstrates that plaintiffs faced a choice that was not an inequity imposed by the pricing structure but a fundamental economic conundrum faced by all sellers.'" Pet. 9-10 (quoting Pet. App. 45a (internal quotation marks and citation omitted); emphases added). And their selective quotation of the opinion's summary conclusion (Pet. App. 49a) does not show, as petitioners suggest, that the Sixth Circuit "took no note" of the alleged differences between them and "favored distributors [that] already qualified for the best prices when the new pricing program began." Pet. 10. Petitioners simply close their eyes to the Court of Appeals' extended discussion—and factual rejection—of the supposed differences between petitioners and other wholesalers. Pet. App. 43a-47a.

In sum, the Sixth Circuit accepted that the functional availability doctrine applies to RJR's market share discount program. It found, however, that petitioners had failed to establish that the discount was actually functionally

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petitioners had sold at the average level for their counties, they would have received higher discounts. R.165, JA676.

unavailable because petitioners did not substantiate their assertion that their customers had atypical preferences that prevented petitioners, as a practical matter, from accepting the same offer to which other wholesalers agreed. That being so, the question petitioners seek to resolve—whether a buyer's deference to atypical customer preferences, like characteristics such as a buyer's small size, can render a facially neutral discount program functionally unavailable to that buyer—is not presented here. And, even if that question were presented, petitioners allege no split of authority that would warrant this Court's addressing the issue now. Because the Sixth Circuit's application of the intrinsically factbound functional availability test did not resolve any significant legal issue, it cannot possibly warrant this Court's attention.

II. PETITIONERS ALLEGE NO SPLIT OF AUTHORITY AND THE SIXTH CIRCUIT'S DECISION FULLY ACCORDS WITH ROBINSON-PATMAN ACT PRECEDENT

Petitioners' merits-based arguments—that the Sixth Circuit's decision conflicts with *Morton Salt*, lacks support in lower-court case law, and improperly interprets the Robinson-Patman Act (Pet. 14)—simply build upon their erroneous characterization of the Sixth Circuit's decision. Further, even if the Court of Appeals' opinion does something more than apply settled law to the facts of this case (and it does not), petitioners allege no split of authority and for that reason their petition should be denied. In all events, the Sixth Circuit expressly followed and applied *Morton Salt*; the decision conforms with lower-court precedent applying the functional availability test; and petitioners' proposed *per se* rule against share-based discounts would turn the Robinson-Patman Act on its head.

As discussed in the Statement and Part I, *supra*, nowhere in its opinion did the Sixth Circuit rule, as petitioners claim, that "there is no price discrimination as a matter of law when

discounts are offered to all buyers but on terms that disfavored buyers cannot comply with and still stay in business." Pet. 16. It is thus transparently clear that the Sixth Circuit did not "effectively overrule[]" (Pet. 16) this Court's decision in *Morton Salt*, which had to do with volume (not share-based) discounts, but rather applied the principles of functional availability developed in that case to the market share program at issue in this case. As the Court of Appeals explained at the outset of its discussion of the functional availability doctrine, *Morton Salt* "deemed a volume discount program to be illegal under the circumstances because the manufacturer set the minimum purchase requirement so high that it was impossible for small buyers to obtain the discounts received by large buyers." Pet. App. 23a. The quantity discount at issue in *Morton Salt* was "theoretically," but not "functionally," available to all buyers because many small buyers existed that could not achieve the highest discount and some small buyers did not qualify for any discount at all. 334 U.S. at 42-43. In striking down the "quantity discounts" at issue in *Morton Salt*, this Court emphasized that the legislative history of the Robinson-Patman Act "makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability." *Id.* at 43; *accord id.* at 49.

It is undisputed here that the WPP contained a nondiscriminatory formula that was, unlike the volume-based discount at issue in *Morton Salt*, equally available to both large and small wholesalers. Nothing in the Court of Appeals' decision, furthermore, marks a deviation from the context-specific functional availability test that *Morton Salt* established. Although recognizing that market share programs such as the WPP "theoretically level the playing field by allowing competing purchasers of like commodities to participate on equal terms," the Sixth Circuit expressly rejected any suggestion "that market-share discounts are

immune from Robinson-Patman Act scrutiny." Pet. App. 18a. It thus applied *Morton Salt* straightup—"regardless of the mechanics of [the] pricing structure," Pet. App. 19a—and concluded that petitioners had failed to adduce any evidence showing that RJR's share-based discounts were functionally unavailable to them.

Even if the Sixth Circuit's opinion were something more than a straightforward application of *Morton Salt*, petitioners (to their credit) do not allege that the Sixth Circuit's decision conflicts with any other lower-court decision. That is fatal to their petition. In any event, as the Sixth Circuit explained, the two volume discount cases petitioners cite as "highly significant" (Pet. 20) are "inapposite to the present circumstances." Pet. App. 34a n.12.

First, petitioners cite a 1968 opinion in which the Seventh Circuit concluded that the Federal Trade Commission had not abused its discretion in issuing a cease-and-desist order relating to a dairy company's volume discounts. *See Nat'l Dairy Prods. Corp. v. FTC*, 395 F.2d 517 (7th Cir. 1968). In so doing, the court rejected National Dairy's argument that the "disfavored independents should have joined voluntary or cooperative groups and thus obtained higher discounts," explaining that the Robinson-Patman Act was specifically intended "to protect the independents from the chains and other large buying groups." *Id.* at 523. As the Sixth Circuit noted, "[t]he present case, unlike *National Dairy*, neither involves a volume discount nor avers that plaintiffs must join forces and sacrifice their independence in order to protect themselves from large distributors." Pet. App. 35a n.12.

Second, petitioners cite a district court decision, decided at the preliminary-injunction stage, concluding that there was a "better than negligible" chance that a brewing company's volume discount program violated the Robinson-Patman Act. *Calumet Breweries, Inc. v. G. Heileman Brewing Co.*, 951 F. Supp. 749, 752 (N.D. Ind. 1994). The district court there found "ample evidence" that Heileman administered the

program in a discriminatory manner so as to favor one particular buyer, making "retroactive quantity adjustments [that] in effect resulted in a secret discount that only the [favored buyer] could obtain." *Id.* at 754. In response to Heileman's argument that the plaintiff could have purchased enough beer to get the higher discounts and placed them in storage, the *Calumet Breweries* court noted that Heileman "handicap[ped]" that possibility by "refus[ing] to sell certain products to [plaintiff]" and by "recommend[ing] that its wholesalers maintain only a twenty-day supply of product in inventory." *Id.* at 755-56. The district court thus concluded that "it appears that the program is structured so that only one buyer . . . would ever by able to obtain the maximum discount at a given time." *Id.* at 756. Here, in contrast, there is "no evidence that RJR manipulated the WPP to favor certain wholesalers," Pet. App. 43a,[4] and "no evidence that anything other than plaintiffs' marketing decisions impacted their ability to obtain the WPP's best prices," Pet. App. 45a.

Unable to identify a single case in conflict, or even in tension, with the Sixth Circuit's decision, petitioners are left with their argument that the decision is not "supported" by the lower-court cases it cites. Pet. 17. This argument is meritless.

Petitioners maintain that the functional availability doctrine applies only where "the plaintiff's own conduct and free choices" prevent it from receiving the highest discount, whereas here "there was no real choice for [p]etitioners." Pet. 17, 19. But petitioners nowhere address the Sixth Circuit's unequivocal finding that, like all other wholesalers, they *did* have a choice to achieve higher discounts by either

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[4] Petitioners themselves maintain that RJR established the WPP in response to "fourth-tier[] manufacturers" whose collective share grew from virtually nothing to 15 percent in about five years, referring to themselves and other wholesalers as "pawns" in the competitive struggle among cigarette manufacturers. Pet. 13a.

altering their "marketing decisions" or "sales mix." Pet. App. 45a-46a. This was, as the myriad cases cited by the Sixth Circuit make clear, a "real choice"—regardless of petitioners' subjective understanding of that term. *See* Pet. App. 23a-35a. A discount is functionally available where "[i]t [i]s a matter of discretion with each [buyer], in the exercise of its business judgment, whether to take advantage of the promotion." *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1326 (6th Cir. 1983); *see also Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1579 (N.D. Ga. 1992) (upholding discount program where plaintiff failed to obtain highest discounts because it made "a marketing decision . . . to concentrate on sales to smaller volume customers as opposed to large fleet purchasers"). Even difficult or unpalatable business choices do not render a nondiscriminatory discount program, such as the WPP, functionally unavailable. *See, e.g., Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 121 (3d Cir. 1980) (upholding discount program available on equal terms to all buyers even though plaintiff would have had to move its plant in order to receive a higher discount); *Am. Tara Corp. v. Int'l Paper Co.*, No. 79C1470, 1981 WL 375752, at *2-3 (N.D. Ill. July 30, 1981) (upholding discount program where all buyers were given the same choice, even if accepting would place plaintiff "in extreme jeopardy" and "threaten[] [its] very existence").[5] As the Sixth Circuit concluded, this functional availability precedent reflects that "purchasers in competitive markets, particularly multi-brand distributors or

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[5] Thus, even if petitioners had come forward with evidence establishing that their customers had immutable preferences for fourth-tier cigarettes—contrary to the working premise of all marketing and advertising—petitioners always had the option of receiving higher discounts by reducing the quantity of non-RJR savings brand cigarettes they sold. That may have presented a tough business choice, but it did not render the nondiscriminatory WPP functionally unavailable to petitioners.

wholesalers, must make difficult economic choices, prioritize brand sales, and often decline conditional discounts for reasons unrelated to their actual ability to obtain them." Pet. App. 33a. And the undisputed evidence here provides at least one reason why petitioners would choose *not* to participate in the WPP: the offsetting benefit of the large profit margins on their sale of fourth-tier cigarettes. R.174, J3066; R.65, JA250-51, 281.

Petitioners' assertion that the Court of Appeals' ruling "will make the [Robinson-Patman] Act almost a dead letter" is just more unsubstantiated hyperbole. Pet. 22. The Sixth Circuit's decision in no way undermines *Morton Salt*'s distinction between large and small buyers, contrary to petitioners' claim. Pet. 14, 16-17. The decision, moreover, furthers the actual goal of the Robinson-Patman Act, which, as this Court recently reiterated, is to "stimulat[e] *competition*," not to "protect[] . . . existing *competitors*." *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S. Ct. 860, 872 (2006) (emphases in original). "Interbrand competition . . . is the primary concern of antitrust law," and "[t]he Robinson-Patman Act signals no large departure from that main concern." *Id.* at 872. The WPP undeniably furthers interbrand competition between RJR and all other cigarette manufacturers, thereby creating "[l]ow prices [that] benefit consumers." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990).

In contrast, as every judge to have considered their theory has concluded, petitioners ultimately seek "'tailor-made' discounts which themselves presumptively violate the Robinson-Patman Act." Pet. App. 48a (internal quotation marks and citation omitted). The pro-competitive goal of the WPP was to induce customers to switch to RJR savings brand cigarettes. R.174, JA1157; R.65, JA207-08. As the Sixth Circuit explained, "[c]ommitment to a particular product is the sine qua non of an incentive program" and, thus, "by definition, an incentive-based program will lead to different outcomes for different purchasers." Pet. App. 20a;

see also Bouldis, 711 F.2d at 1327 (explaining that promotional packages "provid[e] economic incentives" to "enhance the sale of products"). Petitioners, by contrast, demand the same discounts received by those selling a greater percentage of RJR savings brands. That is not an incentive; that is a subsidy. *See* Pet. App. 47a ("Plaintiffs essentially argue that [RJR] should have set the targets on a per-distributor basis which, of course, would be tantamount to having no market-share-based incentive program at all.") (internal quotation marks and citation omitted); Pet. App. 113a ("In effect, the plaintiffs seek to reap the rewards of the WPP without furthering the purpose of that program, *i.e.*, increasing the demand for RJR products."). And incentive programs—which enhance interbrand competition and yield lower prices for consumers—would cease to exist if their legality "only could be ascertained with respect to each and every buyer after a jury decides whether the business decisions forced upon that buyer were reasonable or not." Pet. App. 48a (internal quotation marks and citation omitted).

The Sixth Circuit therefore correctly concluded that "[a]lthough plaintiffs argue that they are not challenging market-share-based discount programs *per se*, in reality they are." Pet. App. 48a (internal quotation marks and citation omitted). Petitioners would have this Court condemn a pro-competitive discount program for their own financial benefit—an interpretation of the Robinson-Patman Act "[d]ivorced from competition and consumer welfare" and foreign to "the purpose of the antitrust laws." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2724 (2007). Because they offer neither evidence nor authority in support of their claim, and because they concede that there is no split of authority, this Court should decline the invitation.

CONCLUSION

The petition for a writ of certiorari should be denied.

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